No. 91-1200 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE CITY OF CINCINNATI,
Petitioner,

vs.

DISCOVERY NETWORK, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied this Court's test for evaluating the constitutionality of regulations burdening commercial speech.

2. Whether the enforcement of Petitioner's ordinance prohibiting the distribution of commercial handbills on the public right of way so as to ban Respondents' newsracks violates the first amendment to the United States Constitution.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, Pet. App. 1a-17a, is reported at 946 F.2d 464. The opinion of the United States District Court for the Southern District of Ohio, Pet. App. 18a-25a, is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 11, 1991. The petition for a writ of certiorari was filed on January 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and is not disputed.

MUNICIPAL ORDINANCE INVOLVED

Section 714-23 of the Cincinnati Municipal Code, which provides, in pertinent part:

> Nor shall any person hand out or distribute or sell any commercial handbill in any public place.

STATEMENT

On June 1, 1990, Respondents Discovery Network, Inc. ("Discovery Center") and Harmon Publishing Company, Inc. ("Harmon"),[1] filed a complaint in the district court pursuant to 42 U.S.C. § 1983, alleging that Petitioner The City of Cincinnati's ("City") regulatory scheme prohibiting the distribution of commercial handbills on the public right-of-way, both facially and as applied to Respondents' newsracks, violated Respondents' first and fourteenth amendment rights of freedom of speech and equal protection of the laws and Respondents' fourteenth amendment right to procedural due process. Respondents sought both declaratory and injunctive relief. Upon the City's agreement not to enforce its regulatory scheme pending a hearing on the merits, the district court consolidated Respondents' motion for preliminary injunction with the hearing on the merits pursuant to Fed. R. Civ. P. 65(a)(2). Following that hearing on July 9, 1990, the district court issued findings of fact and conclusions of law, holding that Respondents' publications are commercial speech and that the City's regulatory scheme violates Respondents' first amendment rights.[2] The district court found that the "fit" between the City's goals of enhancing safety and the aesthetic appeal of the right of way, on the one hand, and the total ban of Respondents' newsracks, on the other, was "unreasonable."

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[1] Respondent Discovery Network, Inc. has no parent company and no nonwholly owned subsidiary. The parent companies of Respondent Harmon Publishing Company, Inc. are:

The Harz Group
The Harmon Group
Hartz Mountain Corporation
Hartz Mountain Industries

Respondent Harmon Publishing Company, Inc., has no nonwholly owned subsidiary.

[2] The district court ruled in the City's favor on Respondents' due process claim and did not reach Respondents' equal protection claim. Respondents did not cross-appeal either from the district court's judgment on the due process claim or from its determination that their publications are commercial speech.

under this Court's decisions in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 447 U.S 557 (1980), and *Board of Trustees of State University of New York* v. *Fox*, 492 U.S. 469 (1989). Pet. App. at 23a. The ban was "excessive," the district court found. Pet. App. at 24a. The number of newsracks prohibited was "minute" in comparison with the total number of newsracks remaining on the right of way; therefore, the resulting effect on the City's goals was "minimal." *Id.* The district court entered judgment on August 23, 1990. The City filed a timely Notice of Appeal. On October 30, 1990, the district court stayed execution of its judgment pending appeal. On October 11, 1991, following briefing and oral argument held on April 30, 1991, the United States Court of Appeals for the Sixth Circuit issued an opinion affirming the judgment of the district court and entering judgment accordingly. The City filed a timely Petition for a Writ of Certiorari in this Court.

Respondent Discovery Network, Inc. ("Discovery Center") is an Ohio corporation that promotes, for a fee, non-credit life-long learning programs, recreational opportunities and social events for individuals in the greater Cincinnati area. Discovery Center promotes and publicizes its programs by distributing a free magazine that is published nine (9) times per year. In February, 1989, the City issued Discovery Center a permit to distribute its magazine in newspaper vending devices ("newsracks") located on City sidewalks. The permit was issued pursuant to Amended Regulation 38, which, at all times relevant, governed the method of placement of newsracks upon the public right-of-way with respect to vehicular and pedestrian traffic and ramps for the handicapped and regulated the manner in which newsracks advertised the publications they contain.[3] Discovery Center purchased fifty (50) newsracks, thirty-eight (38) of which were placed in various locations in downtown Cincinnati, all in locations preapproved by the City. Approximately one-third (⅓) of the Discovery Center magazines being distributed in the City of Cincinnati are distributed by means of these newsracks.

[3] On May 31, 1991, following oral argument in this case, the City Manager of the City of Cincinnati approved Administrative Regulation 67, which currently governs "Newsracks in the Public Right-of-Way." Administrative Regulation 67 provides, in pertinent part,

> Section 2 Downtown — Central Business District
>
> (2). No more than two (2) newsracks in one location may contain commercial handbills as defined in Section 714-1-C of the Cincinnati Municipal Code unless there are vacant positions. The third and subsequent commercial handbill dispensing devices will be displaced when newspapers are granted permits for those positions.

Although the City is currently enforcing Administrative Regulation 67, it has notified Respondents of its intention to again enforce the ordinance at issue in this case, so as to ban Respondents' newsracks, should it prevail on the merits in this Court.

Discovery Center's newsracks are free-standing metal dispensing machines approximately three (3) feet high, three (3) feet wide, and eighteen (18) inches deep and comprise a dispensing box set upon either a pedestal or a four-legged stand. At all times relevant, Discovery Center's newsracks were affixed to certain sites such as light poles by means of chains, as were numerous newsracks belonging to local and national newspapers. Discovery Center's newsracks were at all times relevant in compliance with the requirements of Amended Regulation 38.

Respondent Harmon Publishing Company, Inc. ("Harmon") is a New Jersey corporation registered to do business in Ohio that publishes and distributes magazines advertising real estate in locations throughout the United States, including the Cincinnati area. Harmon distributes a free publication, *Homes Magazine*, through free-standing, weighted plastic newsracks placed in twenty-four locations in the Cincinnati area. Approximately fifteen (15) per cent of the magazines Harmon distributes in the Cincinnati area are distributed

through its newsracks. On July 21, 1989, the City approved Harmon's request for a newsrack permit pursuant to Amended Regulation 38. As was true of Discovery Center's devices, at all times relevant Harmon's newsracks fully complied with Amended Regulation 38.

On February 7, 1990, the City Council of the City of Cincinnati passed a motion requiring the City's Department of Public Works to enforce the City's existing ordinances governing the distribution of "commercial handbills" on the public right-of-way so as to bar from the right-of-way newsracks from which "commercial handbills" were distributed. The City Manager reported that, pursuant to the relevant ordinances (Cincinnati Municipal Code Sections 714-23 and 714-1-C) and Amended Regulation 38, he would henceforth instruct the Public Works Department to approve newsrack requests only for publications primarily presenting coverage of, and commentary on, current events.[4]

On March 8, 1990, the City sent identical letters to Respondents Discovery Center and Harmon, advising them that their respective publications had been deemed "commercial handbills" under Municipal Code Section 714-1-C and revoking their newsrack permits. Administrative hearings were held regarding the City's order revoking Discovery Center's and Harmon's newsrack permits on April 5, 1990, and April 26, 1990, respectively. Both Discovery Center's and Harmon's appeals were denied, and each was ordered to remove its newsracks from the City right-of-way. The instant litigation then ensued.

At the hearing on the merits before the district court, City Architect Robert Richardson testified that although the City has since 1979 attempted to develop aesthetic standards governing structures upon the City's right-of-way, none has been enacted into law. The City had drafted and was intend-

[4] The texts of Amended Regulation 38 and Section 714-1-C of the Cincinnati Municipal Code are set forth in the opinion of the court of appeals. Pet. App. at 2a, 3a.

ing to enforce a set of guidelines developed in cooperation with newspaper publishers which would regulate not only the placement of vending devices but also their design, imposing a degree of uniformity in size and appearance which the City Architect found desirable. The City had not included Discovery Center or Harmon in its negotiations concerning these guidelines, which, at the time of the hearing, had been embodied in a proposed administrative regulation dated June 14, 1990.[5] Respondents' witnesses testified that there was no provision of the proposed regulation with which Discovery Center and Harmon would be unable or unwilling to comply.

The City Architect conceded that there was "nothing wrong with" Discovery Center's and Harmon's newsracks from an aesthetic point of view. TR-20. Furthermore, he was not aware of any safety problems caused by Respondents' newsracks. Indeed, the City Architect testified that were Respondents to use the same newsracks as the newspapers, or any other device deemed appropriate by the City, he would have no aesthetic objection. His concern was that if some publications deemed "commercial handbills" were allowed to have newsracks on the public right-of-way, others would follow and the numbers could become a significant problem. He also testified, however, that the same proliferation concerns would be implicated if additional numbers of publishers of publications not deemed "commercial handbills" sought to place newsracks on the public right-of-way.

According to the City Architect, all newsracks, collectively, posed aesthetic problems due to their lack of uniformity in design. The problem of rusting of City poles caused by the chains used to secure newsracks raised safety and aesthetic concerns implicating all newsracks on the right-of-way. Similarly, the City Architect's concerns with respect to

[5] The guideline ultimately approved is Administrative Regulation 67, which currently governs newsracks in the public right of way.

aesthetics, location and quantity related to all newsracks, regardless of the type of publication they contained. If the quantity and size of newsracks were regulated in some manner, the City Architect testified, those concerns would be satisfied.

City Engineer Thomas Young, whose office is responsible for issuing newsrack permits, testified that Respondents' permits were the first to be requested by publications that were not newspapers. He knew of no damage or injury claims attributed to Discovery Center's newsracks, and he was aware of only one complaint regarding either of Respondents' newsracks, a complaint from a merchant who objected to the placement of a Discovery Center newsrack near her store (a complaint which Discovery Center had readily addressed and remedied).

The City Engineer testified that the decision to revoke Respondents' newsrack permits was related to the general "problem of the proliferation of the [dispensing] device." TR-64. Respondents' newsracks, the City Engineer stated, were not specifically ordered removed from the City right-of-way because they presented safety or aesthetics problems. It was the general "issue of proliferation of dispensing devices" which was a potential safety issue. The City Engineer acknowledged that if commercial publications such as Respondents' "were considered legal," there was no reason why the City's proposed regulation could not be applied to them. Young Deposition at 52-53. He estimated that at the time of the hearing there were between fifteen hundred (1500) and two thousand (2000) dispensing devices on the City right-of-way. Only four publishers — including Respondents — had applied for newsrack permits from 1989 until the date of trial. Indeed, only four publishers of "commercial" publications had applied for newsrack permits in the five years that Mr. Young had served as City Engineer.

REASONS WHY THE PETITION SHOULD BE DENIED

1. This case is firmly grounded in its particular facts, which pertain to the dissemination of protected commercial speech in newsracks.

The City contends that this Court's plurality opinion in *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981), should control the outcome of the instant case. Pet. at 13. It is important, therefore, to examine why this Court determined that the ordinance before it in *Metromedia*, which completely prohibited off-site billboards displaying commercial speech, "directly advanced" the City of San Diego's interests in safety and aesthetics, as required by *Central Hudson Gas & Electric Corp.*, v. *Public Service Commission of New York*, 447 U.S. 557 (1980). In *Metromedia*, the California Supreme Court had held that because billboards were designed to distract a driver's attention from the road, and in fact do so distract, an ordinance eliminating those billboards reasonably relates to traffic safety. 453 U.S. at 508-09 (citing 26 Cal. 3d. at 859, 610 P.2d at 412)). This was so even though there was controversy as to whether the distractions of billboards in fact caused traffic accidents. *Id.* Since the legislative judgment was not unreasonable, this Court found that the City of San Diego's safety concerns were directly advanced by the ban. 453 U.S. at 509. This Court also looked to the inherent characteristics of billboards in deciding that the ban directly advanced the City's aesthetics concerns. "It is not speculative," this Court stated, "to recognize that billboards *by their very nature, wherever located and however constructed*, can be perceived as an 'esthetic harm.' " *Id.* at 510 (emphasis added). *Metromedia* is securely grounded in its facts, as it *expressly* deals with the unique problems associated with the noncommunicative aspects of billboards. As this Court put it, "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method. We deal here with the law of billboards." *Id.* at 501 (quoting *Kovacs* v. *Cooper*, 366 U.S. 77, 97 (1949)).

Unlike *Metromedia*, the instant case involves the law of commercial speech as it relates to the dissemination of such speech by means of newsracks. There was no testimony below that newsracks, by their very nature and regardless of their design or location on the public right of way, represent a threat to the City's interests in safety and aesthetics. To the contrary, the City Engineer expressly testified that the City's interest in banning Respondents' newsracks containing "commercial speech" was motivated neither by aesthetic nor safety concerns. TR-64. Indeed, the notion that the presence of newsracks on the public right of way is inherently at odds with the City's efforts to enhance public safety and aesthetics is belied by the City's own evidence. As the City Engineer testified, the City has worked with local newspapers to devise a proposed regulation restricting the number, design and placement of newsracks containing "non-commercial" publications. This testimony evidences the City's willingness to permit thousands of newsracks to remain on the public right of way, provided they satisfy the regulation's requirements. The City presented scant evidence that Respondents' newsracks pose a particular threat to its interests, let alone a threat materially differing from that assertedly posed by newsracks unaffected by the ban. In the absence either of such evidence, or of evidence that newsracks in general are inherently and irremediably unattractive or threatening to public safety, the City's ban of Respondents' newsracks cannot be justified by the reasoning of the plurality of this Court with respect to billboards in *Metromedia*.

2. The court of appeals applied well-settled legal principles in a manner entirely consistent with the relevant decisions of this Court in holding the City's ban unconstitutional.

From the outset of this litigation, the City has been guided by its assumption that Respondents' publications are not protected by the first amendment, even though Respondents' speech is concededly neither false nor misleading. As this Court's jurisprudence governing commercial speech makes clear, the City's assumption is without foundation. Contrary to the City's contention, Pet. at 11-13, the court of appeals decided this case in a manner entirely consonant with the analytical framework set forth by this Court in *Central Hudson Gas & Electric Corporation* v. *Public Service Commission of New York*, 447 U.S. 557 (1980), and recently interpreted by this Court in *Board of Trustees of the State University of New York* v. *Fox*, 492 U.S. 469 (1989). It is undisputed that the activities promoted by Respondents' publications are lawful and that the speech contained therein is not misleading. Therefore, Respondents' publications are protected by the first amendment. *Posadas De Puerto Rico Associates* v. *Tourism Company of Puerto Rico*, 478 U.S. 328, 340 (1986). Respondents concede that the City's interests in aesthetics and safety are "substantial," within the meaning of *Central Hudson*. *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 507-08 (1981). Therefore, under *Central Hudson*, the regulation banning Respondents' newsracks from the public right-of-way is constitutional only if (1) "the regulation directly advances the government interest asserted;" and (2) "[the regulation] is not more extensive than is necessary to serve that interest." 477 U.S. at 564. The court of appeals held that the City's ban does not satisfy the last element of the *Central Hudson* test, because the ban does not embody a "reasonable fit" within the meaning of *Fox*, between the City's goals and the means chosen to effectuate those goals. Pet. App. at 7a, 13a.

The City contends that in so holding the court of appeals embarked upon an unprecedentd mode of analysis. Pet. at 13. In fact, the court of appeals was entirely faithful to this Court's interpretation of the *Central Hudson* test in *Fox*, in which this Court eschewed both a least restrictive means test and a rational basis test for determining whether a regulation burdening commercial speech satisfies the *Central Hudson* requirement that the regulation be "no more extensive than is necessary" to serve the asserted government interest. As this Court required in *Fox*, the court of appeals took into account the cost of the ban to Respondents, and measured that cost against the benefits the ban would have for the City's interests in public safety and aesthetics. Pet. App. at 13a. The court of appeals found, as did the district court, that a ban on Respondents' newsracks, which comprised sixty-two out of a total of between fifteen hundred and two thousand newsracks currently on City sidewalks, would have a "minuscule" effect on the City's concerns for safety and aesthetics. *Id.* at 13a. In contrast, the court of appeals correctly recognized that if the ban were held constitutonal, the cost to Respondents and to the public would be a heavy one: the total loss of the means of distributing thirty-three percent of Discovery Center's publications and fifteen percent of Harmon's publications in the Cincinnati area. *Id.* In determining that the fit between the ban and the City's aesthetics and safety-related goals was unreasonable, under *Fox*, the court of appeals recognized that "commercial speech has public and private benefits apart from [those to be derived from not imposing an undue burden on Respondents' particular commercial speech]." *Id.* That assertion is not without precedent in this Court. Recognition of the inherent value of commercial information that is neither false nor misleading has been implicit in this Court's commercial speech jurisprudence. *See Shapero* v. *Kentucky Bar Association*, 486 U.S. 466 (1988); *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

The City suggests that the court of appeals applied a "least restrictive means" analysis in spite of this Court's rejection of

such a test in *Fox*. Pet. at 12. In fact, the court of appeals has not required Petitioner to follow one and only one regulatory option in order to advance its traffic safety and aesthetics goals. Pet. App. at 14a. The court of appeals' decision reflects its conclusion that Petitioner's ban is "substantially excessive," *Fox*, 492 U.S. at 479, when measured against the more precise means of accomplishing the City's goals that were readily available to the City, and when measured against the inordinate burden an absolute ban imposes upon Respondents' protected commercial speech. Moreover, in weighing the regulatory alternatives available to the City, the court of appeals was not engaging in speculation. The City Engineer testified that the City was attempting to regulate the design, placement and number of newsracks, and that it had developed a proposed regulation in consultation with local newspapers (but without inviting Respondents' participation). As the City's counsel indicated (during oral argument) would eventually be the case, Petitioner has since approved and is currently enforcing an administrative regulation which allows newsracks containing commercial speech on the public right of way and subjects all newsracks to design and numerical limitations, prescribing the manner in which newsracks must be affixed to the right of way and aligned with respect to one another. There is no principled reason why the regulatory criteria the City has devised can not be applied to all newsracks, without reference to the content of the publications they contain. Indeed the City Engineer acknowledged as much when he stated that such regulations could be applied to newsracks containing commercial publications "if [such publications] were considered legal." Young Deposition at 52-53. This is precisely what the court of appeals has required the City to do.

3. The enforcement of the City's ordinance so as to ban Respondents' newsracks fails to directly advance the City's interests in public safety and aesthetics.

The court of appeals' judgment that the ban is an unconstitutional burden upon commercial speech is not only correct under *Fox*. It is also correct because, as the district court's findings indicate, the ban fails to satisfy this Court's requirement in *Central Hudson* that it "directly advance" the City's interests in safety and aesthetics. In *Central Hudson*, this Court explained that "[a] regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." 447 U.S. at 564. As noted above, the City's witnesses asserted that *all* newsracks on the public right of way negatively affect aesthetics and public safety. Yet the City is content to permit the overwhelming majority of newsracks to remain on the right of way, regardless of their total number or their "proliferation," provided those newsracks contain newspapers. The district court found that the number of newsracks affected by the ban is "minute" when compared with the total number of newsracks remaining on the public right of way. Pet. App. at 24a. Therefore, the district court found, the ban's effect on the City's goals was "minimal." *Id.* On review, the court of appeals found that since the ban affects only sixty-two of the between fifteen hundred and two thousand newsracks on the public right of way, the resulting benefit for the City was "minuscule," and could not justify the ban under the cost/benefit analysis required by *Fox*. Pet. App. at 13a. The court of appeals' and the district court's assessments of the impact a ban of Respondents' newracks would have on the City's asserted interests support the conclusion that the ban does not "directly advance" those interests within the meaning of *Central Hudson*. Cf. *City Council* v. *Taxpayers For Vincent*, 466 U.S. 789, 811-12 (1984) (in absence of finding that content-neutral ban on posting of temporary signs on public property would have "an inconsequential effect" on City's asserted aesthetic interests, there was no predicate for district court's finding

that ban failed to advance those interests). Therefore, the ban fails to pass constitutional muster even without reference to the *Fox* cost/benefit analysis.

4. This case does not create a direct conflict among decisions of the Courts of Appeals with respect to the dissemination of commercial speech in newsracks.

Contrary to the City's contention, Pet. at 8-9, there is no direct conflict between the court of appeals' decision in this case and the decision of the United States Court of Appeals for the Eleventh Circuit in *Don's Porta Signs, Inc.* v. *City of Clearwater*, 829 F.2d 1051 (11th Cir. 1987), *cert. denied*, 485 U.S. 981 (1988). In *Don's Porta Signs*, the court reversed the judgment of the distict court holding unconstitutional a municipal regulation effectively banning the use of portable signs for commercial advertising. 829 F.2d at 1054. In so holding, the Eleventh Circuit considered itself bound by its earlier application of the *Central Hudson* test to uphold a content-neutral municipal ban on portable, temporary signs in *Harnish* v. *Manatee County, Florida*, 783 F.2d 1535 (11th Cir. 1986). 829 F.2d at 1053-54. The *Harnish* Court interpreted this Court's decisions in *Central Hudson*, *Metromedia* and their progeny to require a deferential standard in assessing whether a regulation burdening commercial speech satisfies the third and fourth prongs of the *Central Hudson* test. 783 F.2d at 1539. The *Harnish* Court understood this Court's decisions to mean, *inter alia*, that a municipality "must be given discretion in determining how much protection [of its aesthetic interests] is necessary and the best method of achieving that protection." *Id.*

Following that principle, the Eleventh Circuit upheld the city's ban on commercial advertising by means of portable signs without weighing the ban's benefits for the city against its cost to commercial advertisers. 829 F.2d at 1954. *Harnish* and *Don's Porta Signs* were decided without the benefit of this Court's clarification of the *Central Hudson* means/ends

analysis in *Fox*. After *Fox*, it is not enough that a reviewing court determine that a municipality has "a sufficient basis," *Don's Porta Signs*, 829 F.2d 1054 (quoting *Metromedia*, 453 U.S. at 508 (plurality)) for enacting a total ban on a particular mode of commercial speech, in order to uphold such a ban. The inherent value of commercial speech, and the cost to commercial speech resulting from the burden a municipality places upon it, must form part of a court's calculus in determining whether the burden is consistent with the first amendment. *Fox*, 492 U.S. at 480. In the instant case, the court of appeals applied the *Fox* analysis, and is, therefore, not in conflict with *Don's Porta Signs*, which gives essentially no weight to commercial speech interests.[8]

There is likewise no conflict between the court of appeals' decision in the instant case and the decision in *Chicago Observer, Inc.* v. *City of Chicago*, 929 F.2d 325 (7th Cir. 1991), the City's contention to the contrary notwithstanding. Pet. at 7-8. In *Chicago Observer*, the United States Court of Appeals for the Seventh Circuit upheld an ordinance that prohibited "off-premises" advertisements (defined as advertisements for businesses located more than twenty feet from the advertisement) on the public right of way, limited the size of newsracks, and prohibited the attachment of "off-premises" advertisements to newsracks. 929 F.2d at 327. As

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[8] *Don's Porta Signs* is also distinguishable from the court of appeals' decision in the instant case because it is expressly limited to "the aesthetics problems caused by portable signs." 829 F.2d at 1054. In contrast, the City of Cincinnati disavowed the notion that its ban on newsracks carrying Respondents' publications (or like publications) was founded on aesthetic concerns. In addition, in *Don's Porta Signs*, the district court failed to address the impact on Clearwater's aesthetic of a ban prohibiting only portable signs carrying commercial speech. Presumably, since the *Don's Porta Signs* Court analyzed the effect of the ban in terms of the relative unattractiveness of other features of the urban landscape including permanent signs and buildings, 829 F.2d at 1053, the ban at issue in that case eliminated all portable signs regardless of the content of the message they carried. In the instant case, of course, the district court found that the number of newsracks eliminated by the City's ordinance was "minute."

an initial matter, it is unclear whether the first amendment rights of those engaging in commercial speech were directly at issue in *Chicago Observer*, in which a newspaper challenged restrictions upon the manner in which it distributed its publication. The *Chicago Observer* Court did not address the *Central Hudson* test, let alone engage in the cost/benefit analysis required by this Court in *Fox*. Instead, the *Chicago Observer* Court analyzed the ordinance before it by means of the framework enunciated by this Court in *City Council* v. *Taxpayers for Vincent*, 929 F.2d at 328 (citing *Vincent*, 466 U.S. 789, 805-07 (1984)). The ordinance did not affect *publications* differentially because of their content. *Id.* It merely eliminated certain types of advertising and certain types of newsracks. *Id.* at 328-29. Since the ordinance was content-neutral and did not cut off alternative means of communication, the *Chicago Observer* court held that it satisfied the *Vincent* test. *Id.* at 329.

In stark contrast to the facts of *Chicago Observer*, the instant case involves an attack upon Respondents' newsracks that is manifestly based upon the content of the publications they contain. In *Chicago Observer*, the ordinance's objective was a type of newsrack that the municipality deemed particularly offensive to its interests. The "visual clutter" the City of Chicago was attempting to regulate was the Chicago Observer's particular *newsrack* itself, which the Seventh Circuit referred to at one point as a "billboard." 929 F.2d at 327. The decision in *Chicago Observer* simply requires the Observer to obtain a different newsrack in order to remain on the right of way. In the instant case, the "visual clutter" the City is attempting to address is ostensibly newsracks, *in general*. The effect of enforcement of the ordinance, however, is to completely ban Respondents' publications, and *only* Respondents' publications, from the right of way, despite the fact that the City is purporting to address the "visual clutter" caused by newsracks. In clear contradiction of the City's position, Pet. at 8, the distinction between this case, in which the commercial speech subject to the ban is

within Respondents' newsracks, and *Chicago Observer*, in which the commercial speech was *on* the Observer's newsracks, is a critical distinction. Respondents' *publications* are not the source of visual clutter in the instant case. The ban, therefore, does not "respond . . . precisely to the substantive problem," *Vincent*, 466 U.S. at 810, that the City is attempting to address. The City's witnesses testified that there is nothing inherent in Respondents' newsracks which distinguishes them, in terms of a putative affect upon aesthetics or safety, from the newsracks of the other publications the City is content to allow to remain on the public right of way. Contrary to the City's assertion, the court of appeals' decision in this case does not "seriously impair Cincinnati's ability to curtail visual clutter for aesthetic and safety reasons." Pet. at 8. It is consistent with *Chicago Observer* in encouraging the use of limits upon the manner in which publications are distributed in the public right of way, "so long as [the regulations chosen] do not treat newsracks differently according to the content of the publications inside." Pet. App. at 14a. Like other forms of protected speech, commercial speech that is neither false nor misleading is subject to reasonable time, place and manner restrictions. *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 384 (1977). There simply is no conflict between the court of appeals' decision in the instant case and the Seventh circuit's decision in *Chicago Observer*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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